IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 83 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMJIBHAI RUPABHAI CHAUHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 83 of 1987

MR AD SHAH for Petitioner No. 1

MR ND GOHIL APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 13/08/2001

CAV JUDGEMENT

#. The appellant-accused has challenged in this appeal the judgment and order of conviction and sentence dated

24.12.1986 passed by the learned Special Judge, Bhavnagar in Special Case No.2 of 1984 whereby the appellant is convicted for the offence under Section 161 IPC and Section 5(1)(d) of the old Prevention of Corruption Act and sentenced to suffer 2 years R.I. and to pay fine of Rs.2,000/= in default to further undergo 3 months S.I. This appeal was admitted by the Division Bench of this court on 10.3.1987 and the appellant-accused was ordered to continue on bail on the same bail fresh bonds, thus, the order of substantive sentence passed by the learned Special Judge has remained suspended till today.

Prosecution Case :-

Complainant-Popatbhai Nanjibhai PW-1 Ex.7 was facing trial for the offence under Section 304A before the court of Judicial Magistrate, Bhavnagar. The charge against him was that while driving auto rickshaw one person lost his life in accident caused by his rash and negligent driving. Before the learned Magistrate he prayed that he may be given benefit of probation under the Probation of Offenders Act. The report of the Probation Officer was called for by the learned Magistrate. At that time the present appellant-accused was the Chief Probation Officer of Bhavnagar. He submitted his report in favour of Popatbhai and accordingly Popatbhai was released on probation by the learned Magistrate by his judgment and order dated 30.9.1984.

#. The present appellant-accused made necessary entry in the register maintained in his office about the same. Thereafter, after a period of 15 days the accused had gone to the house of the complainant Popatbhai and met his son Amarsinh as he was not present there. Thereafter, again the appellant-accused visited the house of the complainant Popatbhai on 15.11.1984 at about 10.30 a.m. and demanded Rs.300/= for showing favour to Popatbhai by giving good opinion about his conduct in a case in which he was released on probation for a period of one year. The complainant was absolutely poor and he had no money to pay, but ultimately he agreed to pay Rs.100/= in the evening at 6.00 p.m. of that very day i.e. on 15.11.1984.

#. However, the complainant had no money and he was not prepared to pay the bribe amount to the accused, therefore, he went to Anti Corruption Bureau Office at Shahibaug. His complaint was reduced in writing by the Police Inspector, Shri Mahipatrai Trivedi PW-6 Ex.24. Thereafter, panchas were called and first half of the

panchnama was prepared and the complainant was given prior instructions after carrying out experiment of anthracene powder on the note in ultra violet lamp. Thereafter, they reached the house of complainant-Popatbhai in the evening at 6.00 p.m. and it was decided that both the panchas and P.I. will stand outside room of the complainant and they will witness the talk of transaction taken place in the room of the complainant between the complainant and the accused from window (size 18" x 18"). There was some delay in arrival of the accused, therefore, the complainant switched on the light of his room and after some time the appellant-accused went to the house of the complainant. The complainant welcomed him and stated that he was obliged by the act of the accused in submitting report for probation in his favour. However, the accused stated that leave it there and asked him whether he had arranged money or not. On saying so, the complainant took out currency note from his packet and paid to the accused which was received by the accused with his right hand and while he was counting the notes the accused gave a signal and immediately the I.O. and Panchas entered the room and apprehended accused then and there and recovered the notes with anthracene power on it from the appellant accused. Thereafter, second half of the panchnama was prepared and completed.

#. After completing the investigation and obtaining necessary sanction to prosecute the appellant-accused the complaint was filed against the appellant-accused for the offences under Section 161 IPC and Section 5(1)(d) of old Prevention of Corruption Act before the court of Special Judge, Bhavnagar. Accordingly, charge at Ex.4 was framed for the aforesaid offences. The accused pleaded not guilty to the charges and claimed to be tried.

#. To prove its case, the prosecution examined the following witnesses :-

i) Complainant-Popatbhai Nanjibhai PW-1 Ex.7.
ii) Jayrajbhai Savani, Deputy Mamlatdar PW-2 Ex.9.
iii) Mahavir Singh PW-4 Ex.15 who produced record of Criminal Case No.2842 of 1992 decided on 30.9.1983 wherein the probation was given to the accused-Popatbhai, complainant of this case.
iv) Vasantrai Nanalal, Chief Probation Officer PW-5 Ex.17
v) Mahipatrai Trivedi PW-6 Ex.6 who investigated the case.

The prosecution has also relied upon following

documentary evidence :-

i) Ex.16, detailed report made by the present appellant-accused in favour auto rickshaw driver, Popatbhai-complainant in the present case, which was proved in the evidence of Mahavir Singh PW-4.
ii) complaint Ex.8 filed by the complainant-Popatbhai.
iii) Panchnama Ex.10.
iv) Sanction Ex.12 which was proved in the evidence of Ukabhai Nathubhai PW-3.

#. The defence of the accused under Section 313 of Criminal Procedure Code was of total denial. However, he has later on submitted his written statement in his defence, which is at Ex.28 wherein, he tried to explain how the anthracene powder was found on tips of his figures and palms of his hands by saying that after some talk he asked for papers of medical prescription, at that time the complainant took out something from his pocket. He had no idea about it. When he tried to put it in his hands at that time he (accused) realised that it was currency note, therefore, he snatched his hand, but in that process note touched his entire palms and they fell down on the cot lying there. At that time P.I., Trivedi and others came.

#. The learned Judge, after considering the aforesaid oral as well as documentary evidence led by the prosecution and the defence of the accused came to the conclusion that the prosecution proved its case against the accused beyond reasonable doubt and the defence of the accused was neither reasonable nor probable, therefore, convicted the accused for the aforesaid offences for which he was charged and sentenced him accordingly, as stated earlier.

#. Learned counsel Shri Shah for the appellant-accused firstly submitted that in this case sanction was granted mechanically as per the proforma prepared by the investigating agency and while granting sanction the sanctioning authority has not applied its mind, therefore, the accused should be acquitted.

#. It is true that in the instant case, the authority which has granted sanction is not examined, but the said sanction is duly proved at Ex.12 in the evidence of Ukabhai PW-3. At that time no grievance was made by the accused for not examining the sanctioning authority. Having carefully gone through the sanction at Ex.13 it cannot be said that the sanctioning authority has granted

sanction mechanically. Hence, this submission of Mr.Shah has to be rejected and accordingly it is rejected.

##. Mr.Shah, then submitted that in the instant case the prosecution failed to prove the initial demand made by the accused and the version of the complainant regarding initial demand of Rs.300/= was highly improbable, unnatural, therefore not reliable. He submitted that if at all the accused was interested in taking bribe from the complainant, then before submitting his report in favour of the complainant-Popatbhai he would have demanded money from the accused and not after submitting his report in favour of the accused. This submission of Mr.Shah has no substance because it has come out in the evidence that after submitting his report he went to inquire whether his report is accepted or not and at that time clerk of the Magistrate told him that the judgment is under typing and his report was accepted. It is clear that till then he was not aware as to whether his report is accepted or not. It is only after the release of the complainant-Popatbhai, in that case on probation the accused would have made demand because Popatbhai had to remain under his supervision for a period of one year. It is true that Amarsinh, son of the complainant Popatbhai is not examined in this case, but the very fact that after 15 days once again accused visited the house of the complainant Popatbhai on 15.11.1984 at 10.30 a.m. is proved in the evidence of complainant-Popatbhai. After making initial demand of Rs.300/= in the morning at 10.30 a.m. on 15.11.1984 the accused agreed to accept Rs.100/= on that evening, therefore, the complainant-Popatbhai decided to lodge complaint because he was not ready to give that amount by way of bribe to the accused. Accordingly, trap was arranged and the very fact that he came in the evening, though little late, proves that because of the demand made by him in the morning only he was there. Nothing has substantially come out in the cross-examination of complainant-Popatbhai on this point and there is no reason for this court not to place reliance upon the testimony of the complainant-Popatbhai on this point that initially he demanded Rs.300/= in the morning of 15.11.1984 and agreed to accept Rs.100/= in the evening by that very day.

##. The version of the complainant-Popatbhai about the immediate demand before acceptance of currency note of Rs.100/= in the evening of 15.11.1984 is duly corroborated by the evidence of independent PW-2-Jayrajbhai Savani, who was Deputy Mamlatdar and also by I.O., Mahipatrai Trivedi PW-6. It is true that at the

time of demand and acceptance of Rs.100/= in the evening neither PW-2 nor I.O. was present in the room because it was a small room of 10 x 10 ft. However, there is no reason for this court not to believe the evidence of independent PW-2 Shri Jayrajbhai, who has clearly stated that he had actually seen the prosecution and heard the talk regarding demand which took place between the complainant and accused in the room as they were standing just outside the room and witnessing everything from the small ventilation of 18 x 18". No doubt it is true that there are some discrepancies in the evidence of the complainant and the PW-1 regarding counting notes. But such minor discrepancy would not be fatal to the prosecution case otherwise their evidence regarding immediate demand before acceptance and acceptance is proved. It is true that P.I. Shri Mahipatrai PW-6, who investigated the case has stated in his evidence that he had not actually seen the acceptance of notes by the accused from the complainant. But, he has specifically stated that he has heard the talk which took place inside the room through ventilation of 18 x 18" size and, therefore, it was more probable that more than one or two persons can see things happening in the room and not more. They were just standing outside the room, therefore, one can easily hear the talks took place sitting in the room.

##. Mr.Shah, then submitted that P.I. Trivedi has admitted in his evidence that RDC is a Member of Vigilance Cell ACB. In spite of that Shri Trivedi has selected Shri Jayraj Savani as Panch No.1, who was Deputy Mamlatdar. He submitted that being Government Officer he should have to stick to his version made in the panchnama otherwise he would be liable for disciplinary proceedings. He submitted that in number of judgments the Hon'ble Supreme Court and this court criticized the selection of Government servants as Panch Witnesses in trap cases. I would not like to refer to any of the judgment of the Hon'ble Supreme Court as well as this court referred by Mr.Shah as I am in full agreement by the law laid down by the Hon'ble Supreme Court and this court about the selection of panchas. As far as possible the investigation agency should refrain itself from selecting Government servants as Panch Witnesses in trap cases, but the hard reality is that because of the lengthy procedure, ordinary citizens are not willing to offer themselves as Panch Witnesses and in such type of situation if the investigation agency has to select panch witness, then they would obviously go for good persons as panch witnesses. However, evidence of such panch witnesses is required to be scrutinised carefully. In

the instant case, at the cost of repetition I may say that except some minor discrepancies in his evidence and evidence of the complainant-Popatbhai there was no discrepancy on the material point of immediate demand and acceptance. In that view of the matter, I do not find any difficulty in placing reliance upon the evidence of independent panch witness Shri Jayrajbhai Savani.

##. It is true that P.I., Trivedi has admitted in his evidence that RDC is the member of Vigilance Cell ACB and Panch witness Jayrajbhai was serving as Deputy Mamlatdar in RDC. But as stated earlier in my considered opinion that would not be a ground to discard the evidence of the panch witness. Lastly Mr.Shah submitted that use of anthracene powder in trap cases was condemned by this court as well as Hon'ble Supreme Court more than once. In spite of it, in the instant case, I.O. Shri Trivedi has used anthracene powder and not deliberately examined Shri Nankubhai, who demonstrated experiment. He, therefore, submitted that benefit of doubt should be given to the accused as on the point of finding of Anthracene power on the tips of the figures and palms of hands of the accused, evidence of all three i.e. complainant, panch, I.O. is wholly inconsistent and vague. In support of his submission, Mr.Shah has placed reliance upon the observations made by the Hon'ble Supreme Court in para 11 of of Raghbir Singh Vs. State of Punjab AIR 1976 SC 91.

##. It is true that in Raghbir Singh's case (supra) the Hon'ble Supreme Court made observation in para 11 of this judgment which I may like to reproduce the same as under:-

> "We may take this opportunity of pointing out that it would be desirable if in cases of this kind where a trap is laid for a public servant, the marked currency notes, which are used for the purpose of trap, are treated with phenolphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of the public servant".

##. The aforesaid judgment of Raghbir Singh's case (supra) of the Hon'ble Supreme Court was also considered by the learned Single Judge of this court in case of Kanubhai Kantibhai Patel Vs. State of Gujarat reported

in 1998(1) GLH 924 it has been heavily relied upon by Mr.Shah.

##. In Kanubhai's case (supra) the learned Single Judge of this court has relied upon the judgment of the Hon'ble Supreme Court Rabindra Kumar Dey Vs. State of Orissa AIR 1977 SC 170. As per Rabindra's case (supra) three cardinal principles of jurisprudence which by now well settled, which are as under :-

"(1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;

(2) that in a criminal trial the accused must be presumed to be innocent unless he is. proved to. be guilty; and

(3) that the onus of the prosecution never shifts".

##. There cannot be any quarrel with the aforesaid golden principles of law laid down by the Hon'ble Supreme Court. However, in my considered opinion none of the judgments cited by Mr.Shah will have any application to this case. It is true that the investigation agency should have gone for more scientific method but merely because in the instant case the investigation agency used anthracene powder that itself would not be a ground to acquit the accused when all the important three prosecution witnesses viz. complainant, panch and I.O. have fully supported the prosecution case and their evidence is found to be wholly reliable by this court. It is true that there is slight variance in expression of the witnesses about the colour of the anthracene power. But that is bound to be there when expert giving his opinion and layman expressing about the colour which was detected on the hands of the accused at the time of experiment after the currency notes were accepted by the accused. One may describe it as light blue colour, one may describe it as bluish colour but this type of discrepancies cannot be fatal to the prosecution. The fact of finding of colour on the tips of the figures and palms of the accused is not questionable at all. One can understand that if marks of anthracene power were not at all visible, then something could have been said but that is not the case here. Mr.Shah has also tried to rely

upon the latest judgment of the Hon'ble Supreme Court reported in 2000 SCC (Criminal) 878 regarding use of anthracene power and old judgments of full bench of this court reported in 1979 GLR 535 regarding use of anthracene powder. At the cost of repetition I must state that as far as possible the investigating agency should not have used anthracene powder and it was desirable that they should have gone for phenolphthalein powder but merely because anthracene powder was used that itself would not be a ground to acquit the accused unless and until the accused is able to show any breach being caused to him, which is not in this case. It may be stated that in the instant case offence was committed way back on 15.11.1994 and that time by and large there was use of anthracene powder by the investigating agency in trap cases. Therefore, it would not be proper for this court to interfere with the order of conviction and sentence passed by the Special Judge and set aside the same on this ground.

##. Even in case of Rabindra Kumar Dey's case (supra) full bench of this court while answering the question referred to it stated about the prejudice caused to the accused while using phenolphthalein powder in trap cases.

##. Learned counsel Shri Gohil was right in submitting that though the Hon'ble Supreme court and this court has deprecated the practice of using anthracene powder in trap cases by the investigating agency but neither the Hon'ble Supreme Court nor this court has held that the use of anthracene powder in trap cases was illegal. He rightly submitted that the observations made by the Hon'ble Supreme Court and this court in aforesaid cases and other cases was only of recommendatory nature where by the investigating agencies were sounded to go for better scientific method than the old method of use of anthracene powder in trap cases. In fact, the accused were never acquitted on the ground of use of anthracene powder. The accused were acquitted in those cases where the Hon'ble Supreme Court or this court was not satisfied with the evidence of the prosecution witnesses like complainant, panch or I.O.

##. In the instant case, finding of anthracene powder immediately on the tips of figures and palms of hands of the accused immediately after acceptance of currency notes clearly suggest that the accused accepted the amount by way of bribe. Once the prosecution proves its case, then burden shifts on the accused. He has to offer reasonable and probable defence. In the instant case, as stated earlier, the accused tried to explain the finding

of the marks of anthracene power on the tips of his figures and palms of hands by saying that the accused took out something from his pocket and when he saw that it was currency note that time he simply snatched his hand and during that process the notes touched his tips of figures and palms of hands, therefore, the marks of anthracene powder was found on hands. This cannot be said to be a reasonable or probable reason. In fact, it is completely a false defence.

##. I must state that learned APP has also relied upon the judgment of the Hon'ble Supreme Court in the case of State of Gujarat Vs. Raghunath Vamanrao Baxi reported in AIR 1985 SC 1092 in reply to the contention raised by Mr.Shah for the accused regarding selection of Government servants as panch witnesses by the investigating agency. In Raghunath's case (supra) the Hon'ble Supreme Court while reversing the order of acquittal passed by the High Court held that it is extremely unfair to a witness to reject his evidence by merely giving him a label that he is a Government servant. In Raghunath's case, the Hon'ble supreme Court has clearly observed that the question each case is whether the witness is a truthful witness and whether there is anything to doubt his veracity in any particular matter about which he deposes. In the instant case, I am fully satisfied that the evidence of PW-2 Shri Jayrajbhai, who is Deputy Mamlatdar is wholly reliable, therefore, merely because he is a Government servant it would not be proper for this court to reject his evidence only on the ground that he is a Government servant.

##. Before parting I must state that Mr.Shah had also criticized the conduct of the I.O. Shri Trivedi. According to Mr.Shah, after registering the complaint he should have handed over the investigation to the other officer. Instead of that he completed the investigation and shown undue interest in the case. It is true that P.I., Trivedi after registering complaint carried out full investigation, but having carefully gone through his entire evidence and more particularly cross-examination, I am fully convinced that Shri Trivedi has not shown undue interest in the matter. In fact, there was no allegation whatsoever or suggestion put to Mr.Trivedi in his cross-examination that he and accused were not on good terms or there was some enmity between them. IN fact, in the instant case the present appellant-accused was Chief Probation Officer. Therefore, criticism made by Mr.Shah against P.I., Mr.Trivedi was not at all well-founded.

##. Except the aforesaid contentions, no other contention was raised by Mr.Shah.

##. In view of the above discussion, I do not find any substance or merit in this appeal and accordingly it is required to be dismissed against the order of conviction recorded by the learned Special Judge.

However, at this stage request was made by learned counsel Shri Shah for the appellant-accused to consider the question regarding sentence. According to Mr.Shah sentence of 2 years R.I. and fine or Rs.2,000/= in default to further undergo 3 months S.I. was too harsh. He submitted that the appellant accused was Chief Probation Officer, Bhavnagar and he was convicted by the Special Judge on 24.12.1986 and in view of the order of conviction and sentence he was dismissed from services on 11.11.1983. Thus, since last more than 18 years he has suffered a lot. Mr.Shah also submitted that his mother and father both died after this incident. His wife aged 50 years is a mental patient since November, 1997. Her treatment is going on till today. Mr.Shah further submitted that the accused has four sons, out of them elder son Ritin who is aged about 28 is also mental patient. His two other sons are not yet settled in their life. Above this, he has the responsibility of maintaining his nine sisters though they are married but he has to discharge his social obligations as a brother on all religious occasions as his younger brother is staying separately. Except him there is no other earning member in his family. In support of his submission Mr.Shah has filed affidavit of appellant-accused Ramjibhai Rupabhai Chauhan. Copy of the same is served to the learned APP Shri Gohil. The same is required to be taken on record.

##. However, learned APP Shri Gohil for the respondent-State of Gujarat submitted that ordinarily corruption appeals are heard at least after 10 to 15 years, therefore, this cannot be said to be a circumstance in favour of the appellant-accused in reducing the sentence. However, considering the other fact and circumstances of the case narrated hereinabove and the fact that the appellant-accused belongs to Scheduled Caste of Chamar caste, he submitted that minimum sentence of at least one year R.I. be imposed instead of 2 years R.I. However, learned counsel Shri Shah for the appellant-accused on the instruction from the appellant accused Shri Ramjibhai, who has personally present before the court stated at the Bar that any substantive sentence would ruin his family. He submitted

that after being dismissed from services, he is hardly earning Rs.1,200/- by way of doing labour work. He further states that the appellant-accused is not inclined to carry the matter further to the Hon'ble Supreme Court if substantive sentance is substantially reduced to 3 months R.I.

##. The court has to exercise its discretion in a most objective manner. In a given case the court can reduce sentence, if it is satisfied, otherwise not. It depends on the facts of each case.

##. Ordinarily, this court would not like to interfere with the order of substantive sentence imposed by the special judge only because the matter is heard and finally decided after 18 years of commission of offence. However, having regard to the peculiar facts of the case stated earlier, I am of the considered opinion that substantive sentence of 2 years R.I. be reduced to 3 months R.I. However, fine of Rs.2,000/= imposed by the special Judge is not interfered. At this stage it is stated at the Bar by learned counsel Shri Shah for the appellant-accused that he had already deposited the said amount before the trial court. In view of the above discussion, this appeal is partly allowed only on the point of sentence and the substantive sentence of 2 years R.I. imposed by the special Judge for the offences u/s. 161 IPC and Sec. 5(1)(d) of Prevention of Corruption Act is reduced to 3 months R.I. However, the order of sentence of fine of Rs.2,000/= is confirmed. The appellant-accused is given 8 weeks time to surrender.

(B.J.Shethna, J.)
*Pvv